IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1211

BULK TERMINALS COMPANY and GERALD L. SPAETH,

Petitioners,

vs.

ENVIRONMENTAL PROTECTION AGENCY, RICHARD BRICELAND, Director of the Environmental Protection Agency, CITIZENS FOR A BETTER ENVIRONMENT, POLLUTION CONTROL BOARD of the State of Illinois, and JACOB D. DUMELLE, DONALD A. HENSS, SIDNEY M. MARDER, RUSSELL T. ODELL, ROGER G. SEAMAN, members of the Pollution Control Board of Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The petitioners Bulk Terminals Company and Gerald L. Spaeth respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this proceeding on September 20, 1976.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois (App. A, *infra*, pp. 1a-14a) is reported at 29 Ill.App.3d 978, 331 N.E.2d 260. The opinion of the Supreme Court of Illinois (App. B, *infra*, pp. 15a-21a) is reported at 65 Ill.2d 31, 357 N.E.2d 430.

JURISDICTION

The judgment of the Supreme Court of Illinois (App. C, *infra*, pp. 22a-23a) was entered on September 20, 1976. Petitioners' timely petition for rehearing was denied on December 2, 1976. (App. D, *infra*, p. 24a). On December 7, 1976, upon petitioners' motion, the Supreme Court of Illinois entered an order staying the issuance of its mandate. (App. E, *infra*, p. 25a) This petition for a writ of certiorari was filed within 90 days of the date of the denial of rehearing below. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. May the State of Illinois, consistent with the requirements of due process of law, deny petitioners an opportunity for judicial consideration of their claim that they are being twice prosecuted for the same offense until *after* the allegedly unconstitutional second prosecution has been completed?

2. Does the Illinois Administrative Review Act deprive petitioners of due process of law because it bars them from seeking judicial interdiction of an administrative prosecution claimed to be violative of their rights under the Double Jeopardy Clause and compels them to endure the prosecution to its completion before they would be entitled to judicial review of their claim under the procedures for review set out in the Act itself?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; ....

2. The Fifth Amendment to the Constitution provides in relevant part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ....

3. Section 2 of the Illinois Administrative Review Act (Ill.Rev.Stat., ch. 110, § 265) provides:

> This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof.
>
> Unless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision. If under the terms of the Act governing the procedure before an administrative agency an administrative decision has become final because of the failure to file any document in the nature of objections, protests, petition for hearing or application for administrative review within the time allowed by such Act, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter.

4. Section 41 of the Illinois Environmental Protection Act (Ill.Rev.Stat., ch. 111½, § 1041) provides in relevant part:

> [A]ny party adversely affected by a final order or determination of the [Illinois Pollution Control] Board may obtain judicial review, by filing a petition for review within thirty-five days after entry of the order or other final action complained of, pursuant to the provisions of the "Administrative Review Act," approved May 8, 1945, as amended and the rules adopted pursuant thereto, except that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court. ***

STATEMENT OF THE CASE

This case arises out of petitioners' efforts to invoke the bar of prior jeopardy in the courts of Illinois to halt the prosecution of administrative actions brought against them to impose monetary penalties under state air pollution laws.

Petitioner Bulk Terminals Company (hereinafter "Bulk") operates a storage facility on the south-side of Chicago, and petitioner Gerald L. Spaeth is its president. For some time prior to this litigation Bulk stored on its premises a chemical called silicon tetrachloride, which was owned by one Cabot Corporation. In April of 1974 a leak developed in one of the tanks containing this substance and, it is alleged, there followed a chemical reaction resulting in emissions of hydrochloric acid vapor and silicon dioxide into the atmosphere (App. A, *infra*, pp. 1a-2a).

Following this incident, the City of Chicago filed several complaints in the Circuit Court of Cook County charging Bulk and Spaeth or other Bulk employees with atmospheric pollution in violation of pollution provisions of the Chicago Municipal Code. A trial was held on these complaints in the Circuit Court and, following pleas of not guilty on behalf of Bulk, the court found Bulk guilty of violating the Municipal Code as charged and imposed fines for each of the violations (App. A, *infra*, pp. 2a-3a). The charges against Spaeth were dismissed.

By the time of trial on the city charges, two actions to impose fines also had been filed with the Illinois Pollution Control Board* charging that these same emissions violated state pollution laws (App. A, *infra*, p. 3a).

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* One of these actions was filed by the State Environmental Protection Agency; the other was filed by a private citizens group pursuant to a unique provision in the Illinois En-

(Footnote continued on following page)

On September 8, 1974, petitioners filed a complaint in the Circuit Court of Cook County charging that the Pollution Control Board was exceeding its jurisdiction by continuing to entertain these actions because their prosecution was inconsistent with and contrary to federal and state constitutional guarantees against double jeopardy, and common law principles of *res judicata*, as well.* Petitioners asked the Court to issue an injunction or a writ of prohibition to permanently restrain the Pollution Control Board from so exceeding its jurisdiction (App. B, infra, pp. 16a-17a).

The trial court granted a motion by the State to dismiss the complaint, ruling that the action was "premature" because petitioners had failed to establish that they had exhausted their remedies under the State's Environmental Protection Act and Administrative Review Act. (App. A, *infra*, p. 6a; App. B, *infra* p. 17a). Section 2 of the Administrative Review Act, Ill.-Rev.Stat., ch. 110, § 265, provides, in relevant part, that:

> This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof.

continued

vironmental Protection Act that allows private parties acting in the nature of "private attorneys general" to invoke the sanctions of the Act on behalf of the State. The differences between these two actions are of no significance in the context of this petition.

* The Pollution Control Board previously had denied a motion by petitioners to dismiss the actions on double jeopardy grounds. (App. B, *infra*, p. 16a)

Section 41 of the Environmental Protection Act, Ill. Rev. Stat., ch. 111½, § 1041, provides, in relevant part, that ". . . any party adversely affected by a final order or determination of the Board may obtain judicial review, by filing a petition for review . . . pursuant to the provisions of the "Administrative Review Act" . . . except that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court."

Upon petitioners' application, the Illinois Appellate Court stayed all proceedings before the Pollution Control Board pending appeal of the Circuit Court's decision.*

The State Appellate Court's Decision

The Appellate Court of Illinois reversed the order of the trial court. It refused to construe the exclusive provisions of the Administrative Review Act governing judicial review of *final* administrative decisions as also barring petitioners from seeking immediate judicial relief from an allegedly unconstitutional double prosecution, suggesting that to do so would cast doubt on the validity of those provisions of the Act:

> The Administrative Review Act . . . applies where a final decision of an administrative agency has been made; and other modes of review in such cases are abolished. [citation omitted] In the instant action, however, plaintiffs seek in effect to prevent the State of Illinois from twice prosecuting and fining them for the same offense. We feel that to allow a remedy in a judicial forum only after the fact of double prosecution would be improper and could not be mandated by the Administrative Review Act. That act, like any statute, should be interpreted so

* Order entered October 2, 1974, No. 60865, Appellate Court of Illinois, First District, Fourth Division.

as to promote its essential purposes and to avoid, if possible, a construction that would raise doubts as to its validity. [citation omitted].
[App. A, *infra*, pp. 6a-7a]

The Appellate Court also ruled in petitioners' favor on the merits. Relying on decisions of this Court interpreting the Double Jeopardy Clause of the federal Constitution, the court held that further prosecution of the administrative actions in question was barred by petitioners' prior jeopardy, because the City of Chicago, the Environmental Protection Agency, the Pollution Control Board and the private citizens group all were acting as and on behalf of the State (App. A, *infra*, pp. 8a-9a), the city ordinance and the state statute involved were substantially similar (App. A, *infra*, p. 7a), and that the fines sought were punitive in nature. (App. A, *infra*, p. 10a). The Court also held that the administrative actions would be barred under the doctrine of *res judicata*. (App. A, *infra*, pp. 13a-14a).

The State Supreme Court's Decision

The Supreme Court of Illinois reversed the Appellate Court without considering the double jeopardy issue. The Court said "[t]he question whether . . . the proceedings before the Pollution Control Board are barred by either the constitutional proscription of double jeopardy or the doctrine of *res judicata* is one of law which we need not and do not decide." (App. B, *infra*, p. 19a). The Supreme Court viewed the appeal as involving only ". . . the narrow question whether the allegation of double jeopardy, or alternatively, *res judicata*, should invoke an additional exception to the requirement that administrative remedies be exhausted prior to seeking judicial relief" (App. B, *infra*, p. 19a), and ruled

that the complaint for injunctive relief or a writ of prohibition filed by petitioners in the Circuit Court ". . . failed to state facts which would warrant an exception to the exhaustion doctrine." (App. B, *infra*, p. 21a).

Other than to note that petitioners had made the argument (App. B, *infra*, p. 18a), the Supreme Court did not address itself to petitioners' contention that the Administrative Review Act would be unconstitutional if it were construed to bar the relief they had sought in the Circuit Court. Petitioners raised the constitutional question again in their unsuccessful petition for rehearing, stating that, as a result of the Court's decision ". . . Illinois law affords no meaningful due process resort for the correction of abuses of individual rights by administrative agencies" (App. F, *infra*, p. 28a), and that:

. . . [T]he Court has failed to recognize that the collateral attack of the Board's proceeding made by the plaintiffs through this suit is one that *cannot* be denied a hearing. The courts of Illinois cannot constitutionally refuse to hear this claim because in the final analysis the doctrine of exhaustion of administrative remedies cannot take precedence over the United States Constitution.
[App. F, *infra*, p. 28a]

REASONS FOR GRANTING THE WRIT

It is important that this Court review the decision of the Illinois Supreme Court in this case in order to determine the nature and extent of a State's obligation under the Fourteenth Amendment to afford an accused a timely and meaningful judicial hearing on his claim that the State is invading rights guaranteed him by the federal Constitution.

The right that petitioners sought to protect against state invasion in this case was their right—guaranteed by the Fifth Amendment—not to be put twice in jeopardy for the same offense. That the Double Jeopardy Clause prohibits successive prosecutions as well as successive punishments, and that the States are bound by its prohibitions to their fullest reach is no longer open to question.[1]

In the case at bar, the Illinois Supreme Court, invoking the State's judicially-developed doctrine of exhaustion of administrative remedies, has ruled that petitioners may only secure judicial consideration of their double jeopardy claims through and in conformity

[1] *Benton v. Maryland*, 395 U.S. 784, 794-96 (1969). See also, *Robinson v. Neil*, 409 U.S. 505, 509 (1973); *Price v. Georgia*, 398 U.S. 323, 326 (1970); *Waller v. Florida*, 397 U.S. 387, 388 (1970). The question of whether the actions brought against petitioners before the Illinois Pollution Control Board were barred by the Double Jeopardy Clause was decided in petitioners' favor by the Illinois Appellate Court. The Illinois Supreme Court expressly declined to consider that question and, consequently, the correctness of the Appellate Court's ruling on the merits of the double jeopardy defense is not in issue before this Court. The only question before the Court is at what point in these prosecutions did due process of law require that petitioners be allowed to assert their double jeopardy defense in an Illinois court?

with the procedures provided for in the Illinois Administrative Review Act—a statute that allows, however, for no remedy adequate to provide the relief petitioners seek. The procedures set out in the Administrative Review Act govern review of *final* decisions of administrative agencies, to the exclusion of all other statutory, equitable or common law modes of review (Ill.Rev.Stat. ch. 110, § 265). As interpreted and applied by the Illinois Supreme Court in this case, the Act requires petitioners to defend the administrative prosecutions in question to final decision before they would be entitled to judicial consideration of their claim that the prosecutions were constitutionally barred from their inception.[2] By its ruling that the Administrative

[2] Petitioners are aware that the Court's discussion of *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975) might be read as suggesting that petitioners should have attempted to take an interlocutory appeal from the Pollution Control Board's denial of their motion to dismiss the actions. (In *Beckerman*, the Court of Appeals for the Second Circuit held that it had jurisdiction to review on interlocutory appeal the denial of an accused's motion to dismiss an indictment on double jeopardy grounds. Petitioners cited it below for its recognition that the bar against second prosecutions is meaningless if there is no way to invoke it prior to the second prosecution, not because they thought it procedurally analogous to their case.) In distinguishing *Beckerman*, the Illinois Supreme Court commented:

> The situation in *Beckerman*, however, is clearly distinguishable. Had plaintiffs, despite the statutory provision limiting review to "final" orders, sought review of the interlocutory order of the Pollution Control Board denying their motions, this case would present a question similar to that involved in *Beckerman*. This, however, they did not do. *We note parenthetically that the Court of Appeals for the Fifth Circuit has decided the question contrary to* Beckerman . . . *and that in* People v. Miller, 35 Ill.2d 62, *it was held "that no appeal lies from an interlocutory order in the absence of a statute or rule specifically authorizing such review"*. . . . [App. B. *infra*, p. 21a; emphasis supplied].

Whether the Court actually meant to hold that petitioners had failed to exhaust their remedies in the sense of attempting an interlocutory appeal under the Administrative Review Act is,

Review Act prohibits resort to a *nisi prius* court for the traditional remedies of injunction or writ of prohibition in cases like that at bar, the Illinois Supreme Court effectively has abolished the only procedural vehicle by which an accused might force a halt to an unconstitutional second prosecution before it has done its damage.[3] There being no means for its enforcement, a major element of the Constitution's guarantee of freedom from double jeopardy thus becomes a hollow promise in Illinois, at least where administrative prosecutions are concerned.

[2] *continued*
petitioners submit, immaterial to this Court's consideration of the federal question raised here. The review provisions of the Act expressly pertain only to final administrative decisions. Throughout this litigation, the Illinois Attorney General has been adamant in his insistence that the Act permits no judicial review prior to a final order, and petitioners are not aware that he is prepared to retreat from that position now. The language of the Illinois Supreme Court's opinion emphasized in the quotation above leaves little doubt that the Court shares the view of the Attorney General. To "exhaust" this "remedy", petitioners would be compelled to seek a novel construction of the Act in the face of statutory language and judicial precedent to the contrary, or a declaration that the Act is invalid for failure to make provision for interlocutory appeals. This Court has said that a litigant will not be forced to go to such lengths as a precondition to its consideration of his federal claims. *Mountain States Co. v. Comm'n*, 299 U.S. 167, 170 (1936); *Pacific Tel. Co. v. Kuykendall*, 265 U.S. 196, 205 (1924); *Ohio Valley Co. v. Ben Avon Borough*, 253 U.S. 287, 290-91 (1920). *Cf. Marino v. Ragen*, 332 U.S. 561, 569-70 (1947) (Rutledge, J., concurring).

[3] Perhaps the most unfortunate aspect of this decision is that the consequences of its limitation of the double jeopardy defense are visited most heavily on those most in need of its protection—the accused against whom the state's case is not good. A person against whom the state has prevailed might at least find some comfort in securing after-the-fact judicial acknowledgement that he should not have been forced to endure a second prosecution. However, the person who successfully defends himself, and who, therefore, presumably would have no standing to seek judicial review, would be vulnerable to any number of successive prosecutions, as long as the state continued to fail to make out its case.

The federal guarantee of due process forbids the State of Illinois to so exalt the procedural dictates of its statutes and judicial decisions at the expense of petitioners' substantive constitutional rights. "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682 (1930).[4] In the often-quoted words of Mr. Justice Holmes, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). This Court has exercised its jurisdiction in defense of this principle in a variety of contexts. See, *e.g.*, *Henry v. Mississippi*, 379 U.S. 443, 447 (1965); *NAACP v. Alabama*, 357 U.S. 449, 457-58 (1958); *Hillsborough v. Cromwell*, 326 U.S. 620, 624-26 (1946); *Okla. Gas Co. v. Russell*, 261 U.S. 290, 293 (1923); *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347-49 (1913); *Rogers v. Alabama*, 192 U.S 226, 230 (1904). *Cf. Liner v. Jafco, Inc.*, 375 U.S. 301, 304 (1964); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938); *Love v.*

[4] The petitioners in *Brinkerhoff-Faris* faced a dilemma only slightly less egregious than that confronting petitioners in this case. They brought a bill in equity to enjoin collection of a tax they claimed violated their rights under the Equal Protection Clause. The Missouri Supreme Court, reversing its prior ruling to the contrary, ruled that the State Tax Commission had power to grant the relief sought in their bill, that they should have resorted to that administrative remedy, but now were barred from doing so by laches. They claimed that their rights under the Due Process Clause were violated by the Missouri Court's ruling because it resulted in denying them any hearing on the merits of their Equal Protection claim. This Court agreed, and remanded the case to the Missouri Supreme Court for consideration on the merits. 281 U.S. at 682.

Griffith, 266 U.S. 32, 33-34 (1924). See generally, Hill, *The Inadequate State Ground*, 65 Colum.L.Rev. 943, 959-80 (1965); Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 Harv.L.Rev. 1375, 1387, *passim*, (1961).

When the Illinois Pollution Control Board refused to halt the penalty actions against petitioners then pending before it, their last opportunity to invoke administrative protection of their right to be relieved of an unconstitutional second prosecution was exhausted. Under the State's Administrative Review Act their next opportunity to assert that defense would arise only after the objectionable prosecutions were completed, and then only if the final decision of the Board was adverse. Accordingly, petitioners pursued the only procedural avenue open to them if they were to have any relief at all—an independent action in the State circuit court to invoke its traditional and inherent powers to issue an injunction or writ of prohibition. The Illinois Supreme Court's ruling that the circuit court was barred from entertaining petitioners' demand for such relief because petitioners had not exhausted their remedies under the Administrative Review Act by suffering the prosecutions to a final unfavorable conclusion and seeking review in the Appellate Court, amounts to nothing less than a refusal by the State of Illinois to afford a remedy for the enforcement of a right which the State has no power to destroy.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE APPELLATE COURT OF ILLINOIS

No. 60865

BULK TERMINALS COMPANY *et al.*,

Plaintiffs-Appellants,

v.

ENVIRONMENTAL PROTECTION AGENCY *et al.*,

Defendants-Appellees.

First District (4th Division)—June 11, 1975.

Appeal from the Circuit Court of Cook County; the Hon. ARTHUR L. DUNNE, *Judge*, presiding.

MR. JUSTICE BURMAN delivered the opinion of the court:

This is an appeal by the plaintiffs, Bulk Terminals Company and Gerald L. Spaeth, from an order of the Circuit Court of Cook County, dismissing their complaint. The complaint requested the court to halt proceedings pending before the Illinois Pollution Control Board charging them with violations of the Illinois Environmental Protection Act and air pollution regulations.

Plaintiff, Bulk Terminals Company (hereinafter Bulk), operates a bulk storage facility at 12200 South Stony Island Avenue in Chicago. Plaintiff, Gerald L. Spaeth, is

the president of the firm and is in charge of its daily operations. For several months Bulk stored in its tanks a chemical, silicon tetrachloride, which was owned by Cabot Corporation. On April 26, 1974, a leak developed in one of the storage tanks containing the chemical, and as it reacted with the moisture in the air, it formed hydrochloric acid vapor and silicon dioxide.

Thereafter the city of Chicago served Bulk and Spaeth with a series of complaints alleging violations of section 17—2.6 of the Municipal Code of the city of Chicago.[1] The City alleged that the emissions of hydrochloric acid vapor and silicon dioxide, commencing on April 26, 1974, and continuing through and including May 26, 1974, constituted "atmospheric" pollution in violation of

[1] Section 17—2.6 of the Municipal Code of Chicago (1973) provides:

> "It shall be unlawful within the City of Chicago and within one mile of the corporate limits for any person, owner, agent, operator, firm or corporation to permit to cause, suffer or allow the discharge, emission or release into the atmosphere from any source whatsoever of such quantities of soot, fly ash, dust, cinders, dirt, oxides, gases, vapors, odors, toxic or radioactive substances, waste, particulate, solid, liquid or gaseous matter or any other materials in such place, manner or concentration as to constitute atmospheric pollution."

Section 17—2.1 defines "atmospheric pollution" as:

> "The discharging from stacks, chimneys, exhausts, vents, ducts, openings, buildings, structures, premises, open fires, portable boilers, vehicles, processes, or any other source, of any smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic or radioactive substances, waste, particulate, solid, liquid or gaseous matter, or any other materials in such place, manner or concentration as to cause injury, detriment, nuisance, or annoyance to the public, or to endanger the health, comfort, repose, safety or welfare of the public, or in such a manner as to cause or have a natural tendency to cause injury or damage to business or property."

that section. The complaints were entitled "In the Name and by the Authority of the People of the State of Illinois—City of Chicago a municipal corporation, Plaintiff v. Bulk Terminals Company."

On July 19, 1974, a trial was held in the Circuit Court of Cook County and Bulk was found guilty of violating section 17—2.6 on each and every day from April 26, 1974, up to and including May 9, 1974. The court assessed fines for the violations, and Bulk has paid them.

On or before July 31, 1974, all silicon tetrachloride previously stored by Bulk had been removed from the premises.

Complaints were also filed against Bulk before the Illinois Pollution Control Board (hereinafter Board) by Citizens for a Better Environment (hereinafter CBE) and the Environmental Protection Agency (hereinafter EPA), defendants herein, in connection with the storage tank leak. In the CBE's complaint, Bulk is charged with violations of section 9(a) of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1973, ch. 111½, par. 1009(a)) and related Rule 102 of chapter 2 of the Illinois Pollution Control Board Rules and Regulations for causing air pollution as a result of the leak.[2] Gerald L.

[2] Section 9 of the Environmental Protection Act provides in part:

> "No person shall:
> (a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;
> (b) Construct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit;"

(Footnote continued on following page)

Spaeth, Bulk's president, is named as a co-defendant in the CBE's compiaint, and is alleged to have been responsible for the maintenance of Bulk's storage facilities. In the EPA complaint Bulk is also charged with violations of section 9(a) of the Environmental Protection Act, and with a violation of Rule 102 of chapter 2 of the Rules and Regulations. Both actions were consolidated before the Board. Bulk and Spaeth filed answers to the complaints with the Board and therein set forth facts relating to the prosecution by the City of Chicago, alleging thereby that the prosecution pending before the Board was barred by the doctrine of double jeopardy and res judicata. In addition, Bulk and Spaeth filed before the Board a motion to dismiss and an amended motion to dismiss predicated on the above defenses. The amended motion to dismiss was denied by the Board on September 5, 1974.

Thereafter Bulk and Spaeth filed an action in the circuit court praying for a declaratory judgment with injunctive relief and a writ of prohibition against the

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[2] *continued*

Section 3 of the Act contains the following definitions:

* * *

> (b) "Air Pollution" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.
>
> * * *
>
> (d) "Contaminant" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." Ill. Rev. Stat. 1973, ch. 111½, par. 1003(b)(d).

* * *

Other alleged violations in the CBE complaint relate to plaintiffs' failure to obtain an "operation permit" for a "new emission source," *i.e.*, the leak.

EPA, the CBE, and the Board. By this action they sought to terminate the CBE and EPA actions before the Board. It was contended that the State of Illinois should be prevented from twice prosecuting them for the same offense. The trial court held, on defendants' motion to dismiss, that the action was premature since the plaintiffs had not exhausted all remedies under the Environmental Protection Act and the Administrative Review Act. The plaintiffs action was therefore dismissed, and this appeal followed.

The plaintiffs, herein Bulk and Spaeth, contend that both the Illinois and United States constitutional safeguards against double jeopardy (U.S. Const. amends. V and XIV; Ill. Const. art. I, sec. 10 (1970)), and the doctrine of res judicata, preclude the actions pending before the Pollution Control Board. Double jeopardy is said to have applicability because the plaintiffs are being exposed to punishment for alleged unlawful conduct which they have already been punished for once by the State of Illinois through its political subdivision, the city of Chicago. Res judicata is said to have applicability because both the city action and the Board actions arise from the same subject matter, are in essence the same cause of action, and involve the same parties. It is further urged that this is a proper case for the exercise of the circuit court's power to issue a writ of prohibition or to order injunctive relief, and that the relief requested is not precluded by the failure to obtain first a final order from the Board.

The defendants respond first that the relief sought is premature, and that the proper procedure is an appeal to this court from a final decision of the Board. It is further urged by the defendants that, in any event, the constitutional mandate against double jeopardy and the doctrine of res judicata are for various reasons inapplicable as a bar to the Board proceedings.

We hold herein that, in view of the previous prosecution and fine under the city ordinance, the pending proceedings before the Board are barred either under a theory of double jeopardy or res judicata, and that the request for relief in the circuit court was not premature. We accordingly reverse the order of the circuit court.

As indicated, the circuit court dismissed the plaintiffs' complaint without reaching the merits of the controversy because it viewed the action as premature in that plaintiffs did not exhaust their administrative remedies. This threshold procedural issue must first be given some attention.

The ordinary procedure for reviewing a decision of the Pollution Control Board is pursuant to the Administrative Review Act (Ill. Rev. Stat. 1973, ch. 110, par. 264 *et. seq.*).[3] Section 2 thereof provides in part:

> "This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof." Ill. Rev. Stat. 1973, ch. 110, par. 265.

The Administrative Review Act therefore applies where a final decision of an administrative agency has been made; and other modes of review in such cases are abolished. (*People ex rel. Carpentier v. Goers*, 20 Ill.2d 272, 170 N.E.2d 159.) In the instant action however,

[3] The procedure is modified somewhat by section 41 of the Environmental Protection Act, which provides for direct review in the appellate court rather than in the circuit court first. Ill. Rev. Stat. 1973, ch. 111½, par. 1041.

plaintiffs seek in effect to prevent the State of Illinois from twice prosecuting and fining them for the same offense. We feel that to allow a remedy in a judicial forum only after the fact of double prosecution would be improper and could not be mandated by the Administrative Review Act. That act, like any statute, should be interpreted so as to promote its essential purposes and to avoid, if possible, a construction that would raise doubts as to its validity. (*Craig v. Peterson*, 39 Ill. 2d 191, 201, 233 N.E.2d 345, 351.) Similar exceptions to ordinary administrative review have been sanctioned. See *People ex rel. Hurley v. Graber*, 405 Ill. 331, 90 N.E.2d 763; *W. F. Hall Printing Co. v. Environmental Protection Agency*, 16 Ill.App.3d 864, 306 N.E.2d 595.

In regard to the merits, we emphasize first that both the action filed by the city and by the EPA and CBE similarly alleged that beginning with April 26, 1974, a leak developed in one of the storage tanks on Bulk's premises and by virtue of the leak the silicon tetrachloride contained in the tank reacted with the moisture in the air to produce certain emissions of hydrochloric acid vapor and silicon dioxide. This was alleged to have polluted the air or atmosphere as prohibited by the Environmental Protection Act and the Municipal Code of Chicago. A review of the statute and ordinance, set out in footnotes above, will indicate that there is a substantial similarity between the two. We therefore are of the opinion that the plaintiffs are being exposed to double jeopardy. *Cf. Waller v. Florida*, 397 U.S. 387; *People v. Allison*, 46 Ill.2d 147, 263 N.E.2d 80.

In *Waller v. Florida*, the petitioner had been convicted and sentenced by the city of St. Petersburg for violating city ordinances against destruction of city property and disorderly breach of the peace when he and a group of others removed and damaged a mural which had been

affixed to a wall inside the city hall. Subsequently the State of Florida charged petitioner with grand larceny, and it was conceded that the charge was based on the same acts as were involved in the city ordinance violations. The United States Supreme Court held that successive State and municipal prosecutions for the same conduct constituted double jeopardy. It found relevant certain language in its opinion in *Reynolds v. Sims*, 377 U.S. 533, 575, to which we also subscribe:

> "Political subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."

In the case here, the State has delegated certain of its authority to protect the environment to various subordinate governmental instrumentalities, *e.g.*, municipal corporations, the Pollution Control Board, the EPA.[4] These are not sovereign entities; they are the State of Illinois acting through different agencies. The CBE, although not a State agency as such, by its actions before the Board, purports to represent the people of the State of Illinois under a unique provision of the Environmental Protection Act authorizing such private initiation of enforcement actions. (Ill. Rev. Stat. 1973, ch. 111½, par. 1031(b).) In effect the CBE is acting as a private attorney general, and we view its position to be no different for our purposes here than the State agencies empowered to deal with pollution matters. One prosecuted should not lose the protection made applicable here because of the State's choice of the manner

[4] We again note that the complaints filed by the city were entitled "In the Name and by the Authority of the People of the State of Illinois—City of Chicago a municipal corporation, Plaintiff v. Bulk Terminals Company."

of commencing the action. We further note that ultimate enforcement of any Board order entered in the action commenced by the CBE would be by means of an action by the State's Attorney or Attorney General in the Circuit Court of Cook County, which action would not be brought in the name of the CBE but rather in the name of the People of the State of Illinois. (Ill. Rev. Stat. 1973, ch. 111½, par. 1042(e).) The State, having once placed plaintiffs in jeopardy, cannot do so again through the device of a statutory scheme of citizen-initiated administrative action for penalties.

The defendants center their entire argument regarding double jeopardy on the premise that it is inapplicable because the action before the Board[5] does not seek the imposition of "criminal" sanctions. (*Helvering v. Mitchell*, 303 U.S. 391.)

We first point out that one need not be threatened with more than a mere fine for the principle of double jeopardy to apply. In *People v. Allison*, 46 Ill.2d 147, 263 N.E.2d 80, for example, the State unsuccessfully attempted to distinguish *Waller v. Florida*, 397 U.S. 387, discussed above, by claiming that double jeopardy was not invocable since one of the prosecutions involved in *Allison* had been for the violation of a municipal ordinance which was punishable only by fine.

[5] The nature of the city fine is not focused upon by the defendants. The language of the ordinance elucidates this somewhat in indicating the intent to *punish* violators:

> "Any person found guilty of violating * * * any of the provisions of this Article II * * * upon conviction thereof shall be *punished* by a fine of not less than One Hundred Dollars nor more than $300.00 for the first offense, and not less than $300.00 nor more than $500.00 for the second and each subsequent offense, in any 180 day period; provided, however, that all actions seeking the imposition of fines only shall be filed as quasi criminal actions subject to the provisions of the Illinois Civil Practice Act * * *" (Emphasis added.) Chicago Municipal Code sec. 17—2.62 (1973).

We must acknowledge, however, that the Illinois Supreme Court has, in other contexts, labeled the fines imposed by the Pollution Control Board pursuant to statutory authority as "civil" in nature. (*City of Monmouth v. Pollution Control Board*, 57 Ill. 2d 482, 313 N.E. 2d 161; *City of Waukegan v. Pollution Control Board*, 57 Ill. 2d 170, 311 N.E. 2d 146.) In *City of Waukegan*, the Illinois Supreme Court considered whether the Board could be empowered to assess monetary penalties at all, and held that the authority given the Board to impose such penalties does not violate the constitutional separation of powers or amount to an improper delegation. In *City of Monmouth*, the court deemed the fines authorized as noncriminal in holding that certain procedural safeguards applicable to criminal proceedings are not applicable in proceedings before the Board.

Notwithstanding those decisions, we do not feel constrained to discard the safeguard against double jeopardy in the present case, where the imposition of a second penalty, be it labeled "civil" or "criminal" for other purposes, is being threatened by the State for the same alleged wrong. We hold only this: considering the nature of the violation alleged here, a previous prosecution and fine imposed by the city of Chicago pursuant to its ordinance precludes the threat of a second fine by the Board based on the same conduct.

In *United States v. La Franca*, 282 U.S. 568, the defendant was first convicted and fined in a criminal prosecution under the National Prohibition Act for unlawful sales of intoxicating liquors. Subsequently he was sued by the United States in a civil action for nonpayment of taxes and penalties with respect to the same conduct—unlawful sales of intoxicating liquors. Pleas of former jeopardy and res judicata were overruled by the district court in the civil action and

judgment was entered for the full amount sued for. The court of appeals reversed and was affirmed by the United States Supreme Court. Although the case was ultimately resolved by the court's construction of a statute involved barring double "prosecution," the problem of double jeopardy posed by the facts, and analogous to the instant case, was discussed. The court first considered whether the designation of the amount of money exacted in the civil proceeding as a "tax" was determinative, and stated:

> "A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law, is settled * * *." 282 U.S. at 572.

The court then posed the following question:

> "Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?" 282 U.S. at 573.

The court, adopting the following language from an earlier case (*United States v. Chouteau*, 102 U.S. 603, 611), resolved the question with an analysis which we find quite relevant in the instant case:

> "'*Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law.*

> *The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.* * * * [The defendant] has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless.'" 282 U.S. at 573-74. (Emphasis added.)

The court continued in its own language that "an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action." 282 U.S. at 575.

We thus feel that the designation of the threatened fines in the case at bar as "civil" for other purposes, such as for determining whether certain criminal procedural safeguards are required in the proceeding culminating in the fine (*City of Monmouth v. Pollution Control Board*, 57 Ill. 2d 482, 313 N.E. 2d 161) is not determinative here; and we are likewise of the opinion that "to hold otherwise would be to sacrifice a great principle to the mere form of procedure." The city imposed a fine for the storage tank leak, and its proceedings were a matter of public record. The Board proceedings, like the city prosecution, may culminate in the imposition of a monetary penalty, after the fact, for substantially the same alleged violation. Such a practice smacks of fundamental unfairness. The source of the alleged air pollution has long since been eliminated, and no threat to the environment presently exists. The

objective of penalization once accomplished should end the matter whether the actions are designated criminal or civil. Multiple actions for the same offense should be discouraged or consolidated in some manner by the State. The jurisdiction of a court of equity to restrain the maintenance of vexatious or harassing litigation is well established. 42 Am. Jur. 2d *Injunctions* sec. 206 (1969); 43 C.J.S. *Injunctions* sec. 40(h) (1945).

In closing, we also find that the related concept of res judicata may well have applicability here. In order to rely upon a former adjudication as a bar under this doctrine, it must be determined that the cause of action is the same in both proceedings, the two actions are between the same parties or their privies, and the former adjudication was a final judgment or decree upon the merits by a court having jurisdiction. (*People v. Kidd*, 398 Ill. 405, 408-09, 75 N.E.2d 851, 854.) The doctrine acts as a bar to the consideration not only of questions actually litigated and decided, but to all grounds of recovery or defense which might have been presented in the first proceeding. (*People v. Kidd*, 398 Ill. at 408, 75 N.E. 2d at 853-54.) There is no dispute that the judgment entered in the city action was final and that the court had jurisdiction to render it. Further, as we indicated, the violations alleged are substantially similar in both cases, *i.e.*, causing or allowing air or atmospheric pollution as a consequence of the silicon tetrachloride leak. The slight difference in the language of the statutes does not change the nature of the cause of action for our purposes here. Also, for reasons analogous to those discussed earlier, both the city and Board proceedings involved the same parties or their privies. (See *Healy v. Deering*, 231 Ill. 423, 83 N.E.2d 226.) We disagree with the defendants' strenuous contention that the

difference in remedy or amount of the penalties authorized in the city ordinance and the State statute prohibits the application of res judicata, or compels the conclusion that the legislative purpose behind the Environmental Protection Act will be frustrated by barring the Board proceeding here. It cannot be emphasized too strongly that all of the issues regarding the storage-tank-leak incident could and should have been resolved in one action by the People of the State of Illinois. The same ultimate purpose that was sought by the city—the protection of the environment—is being sought by the defendants here. As we have said, multiple actions for the same pollution violation should therefore be discouraged, or consolidated in some manner by the State. Fairness and justice so dictate.

For the reasons given, the judgment of the circuit court is reversed and the cause remanded with directions to enter an order consistent with the views expressed herein.

REVERSED and REMANDED.

DIERINGER, P. J., and JOHNSON, J., concur.

APPENDIX B

IN THE SUPREME COURT OF ILLINOIS

Nos. 47746, 47754 cons.

BULK TERMINALS COMPANY et al.,

Appellees,

v.

THE ENVIRONMENTAL PROTECTION AGENCY et al.,

Appellants.

Opinion filed Sept. 20, 1976.—Rehearing denied Dec. 2, 1976.

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County; the Hon. Arthur L. Dunne, Judge, presiding.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiffs, Bulk Terminals Company, hereafter Bulk, and Gerald L. Spaeth, its president, appealed from the judgment of the circuit court of Cook County dismissing their action for injunction, or alternatively prohibition, seeking to terminate proceedings commenced by defendants Environmental Protection Agency and Citizens for a Better Environment before the defendant Pollution

Control Board. The appellate court reversed (29 Ill. App. 3d 978) and we allowed petitions for leave to appeal filed by defendant Citizens for a Better Environment (No. 47746) and jointly by the other defendants (No. 47754).

In their complaint for injunction or prohibition plaintiffs alleged that a leak in a storage tank situated at Bulk's premises caused the emission of hydrochloric acid vapor and silicon dioxide; that the city of Chicago filed complaints charging Bulk with violations of section 17—2.6 of the Chicago Municipal Code; that Bulk was tried and found guilty of violations of the ordinance and that fines were assessed and paid; that defendant Citizens for a Better Environment filed a complaint before the defendant Pollution Control Board charging plaintiffs with violations of the Illinois Environmental Protection Act and of certain air pollution regulations; that defendant Environmental Protection Agency also filed a complaint before the Pollution Control Board charging similar violations of the Act and the regulations; that the violations charged in the proceedings before the Pollution Control Board involved the same emissions on the same dates as those for which Bulk was prosecuted under the Chicago ordinance; that plaintiffs filed answers to the complaints before the Pollution Control Board affirmatively setting forth "the facts in support of their constitutional and common law defenses" and a motion and amended motion to dismiss the proceedings; that the defendant Pollution Control Board has denied their motions to dismiss and to stay discovery; and that unless the proceedings before the Pollution Control Board are enjoined they will suffer irreparable loss and damage. In a second count they repeated the allegations and sought as alternative relief the issuance of a writ of prohibition. It is also alleged in the complaint that:

> "10. On or before July 31, 1974, all silicon tetrachloride previously stored on the premises of Bulk had been removed by the owner thereof and transported away from Cook County, Illinois. Bulk has no present intention to store in the future silicon tetrachloride on its premises in Chicago, Illinois."

The circuit court dismissed the suit on the ground that "the complaint fails to establish that plaintiffs have exhausted their remedies under the Environmental Protection Act and the Administrative Review Act * * *." The appellate court, although recognizing that under the Administrative Review Act only final decisions of administrative agencies are reviewable, stated that in this action in which "* * * plaintiffs seek in effect to prevent the State of Illinois from twice prosecuting and fining them for the same offense * * * to allow a remedy in a judicial forum only after the fact of double prosecution would be improper and could not be mandated by the Administrative Review Act." (29 Ill. App. 3d 978, 982.) The appellate court held that the proceedings before the Pollution Control Board were barred by the prior prosecution under the Chicago ordinance and reversed the judgment.

Although the parties and *amicus curiae*, the Illinois Manufacturer's Association, have briefed and argued a number of questions we need consider only whether plaintiffs, prior to seeking judicial relief, were required to exhaust the administrative remedies provided in section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1975, ch. 111½, par. 1041) and the Administrative Review Act (Ill. Rev. Stat. 1975, ch. 110, par. 264 *et seq.*). It is defendants' position that the circuit court "is without jurisdiction to review interlocutory orders of the Pollution Control Board." Plaintiffs contend that "this is

a proper case for the exercise of the circuit court's power to issue a writ of prohibition or to order injunctive relief. Plaintiffs have no other remedy for the wrongs being done to them." They argue that "judicial review of a final order of the Pollution Control Board is inadequate relief because the guarantee against double jeopardy precludes a second prosecution as well as a second punishment," that "*res judicata* not only precludes multiple liability, but subsequent actions to impose that liability as well" and that "the Administrative Review Act does not bar the relief plaintiffs seek; if it did, it would be unconstitutional."

In discussing the doctrine of exhaustion of remedies, in *Illinois Bell Telephone Co. v. Allphin*, 60 Ill. 2d 350, we said:

> "* * * the doctrine of exhaustion has long been a basic principle of administrative law—a party aggrieved by administrative action ordinarily cannot seek review in the courts without first pursuing all administrative remedies available to him. (*Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U.S. 41, 82 L. Ed. 638, 58 S. Ct. 26.) The rule is the counterpart of the procedural rule which, with certain exceptions, precludes appellate review prior to a final judgment in the trial court, and the reasons for its existence are numerous: (1) it allows full development of the facts before the agency; (2) it allows the agency an opportunity to utilize its expertise; and (3) the aggrieved party may succeed before the agency, rendering judicial review unnecessary. 2 F. Cooper, State Administrative Law 572-574 (1965); L. Jaffe, Judicial Control of Administrative Action 424-426 (1965); 3 K. Davis, Administrative Law Treatise secs. 20.01-20.10 (1958), and 1970 Supplement at 642-669.
>
> All jurisdictions have recognized that the exhaustion doctrine, if strictly applied, could sometimes produce very harsh and inequitable results. While

> our courts have required comparatively strict compliance with the exhaustion rule, exceptions have been recognized where an ordinance or statute is attacked as unconstitutional in its entirety (*Bright v. City of Evanston* (1956), 10 Ill. 2d 178), or where multiple remedies exist before the same zoning board and at least one has been exhausted (*Herman v. Village of Hillside* (1958), 15 Ill. 2d 396), or where irreparable harm will result from further pursuit of administrative remedies. (*Peoples Gas Light and Coke Co. v. Slattery* (1939), 373 Ill. 31.) It is not our intention by this opinion to affect these existing exceptions.
>
> These exceptions to the exhaustion doctrine have been fashioned in recognition of the time-honored rule that equitable relief will be available if the remedy at law is inadequate. In those situations covered by these exceptions, further recourse to the administrative process would not, or cannot, for a variety of reasons, provide adequate relief." 60 Ill. 2d 350, 357-9.

The circuit court entered judgment upon allowance of defendants' motion to dismiss and all facts properly pleaded in the complaint are taken as true. (*Acorn Auto Driving School, Inc. v. Board of Education*, 27 Ill. 2d 93, 96.) The question whether, upon those facts, the proceedings before the Pollution Control Board are barred by either the constitutional proscription of double jeopardy or the doctrine of *res judicata* is one of law which we need not and do not decide. Other than a conclusional allegation in the complaint that unless relief is granted they will suffer irreparable harm, plaintiffs do not contend that under the facts alleged this case falls within one of the exceptions recognized in *Allphin*, and we are presented the narrow question whether the allegation of double jeopardy, or alternatively, *res judicata*, should invoke an additional exception to the requirement that administrative remedies be exhausted prior to seeking judicial relief.

It is clear that the motions to dismiss filed before defendant Pollution Control Board were the appropriate method by which to present the issue and that the Board had jurisdiction to decide the question. (*Sugden v. Department of Public Welfare*, 20 Ill. 2d 119, 121; *People ex rel. United Motor Coach Co. v. Carpentier*, 17 Ill. 2d 303, 305.) Plaintiffs, conceding that the order denying the motions to dismiss was interlocutory in nature, argue that the denial of the plea of double jeopardy served to "finally determine rights separate from and collateral to the main action, determine collateral rights that are too important to be denied review and determine rights that will have been lost, probably irreparably, after judgment has been entered." In support of their contention that an interlocutory order denying a plea of double jeopardy is appealable they cite *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975) wherein, at page 906, the court said:

> "The issue of double jeopardy is collateral to the determination of whether the accused is innocent or guilty of the offense for which he has been indicted. The constitutional protection against being twice put in jeopardy for the same offense is a 'valued right,' Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949), that is too important to be denied review. The protection against double jeopardy guards 'not against being twice punished, but against being twice put in jeopardy,' United States v. Ball, 163 U.S. 662, 669, 16 S. Ct. 1192, 1194, 41 L. Ed. 300 (1896). The right will be invaded if an accused, who has properly invoked the Fifth Amendment protection against being twice put in jeopardy, is called upon to suffer the pain of two trials. Green v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).
>
> If an accused is to be afforded 'the full protection of the double jeopardy clause, a final determination of whether jeopardy has attached to the previous trial must, where possible, be determined prior to any retrial.' United States v. Lansdown, 460 F.2d 164, 171 (4th Cir. 1972). Contra, Gilmore v. United States, 264 F.2d 44 (5th Cir. 1959), cert. denied, 359 U.S. 994, 79 S. Ct. 1126, 3 L. Ed. 2d 982 (1959). The reasoning of the opinion in *Lansdown* is persuasive here. We conclude that we have jurisdiction to review the denial of the defendant's motion to dismiss the indictment on the predicate of the double jeopardy clause."

The situation in *Beckerman*, however, is clearly distinguishable. Had plaintiffs, despite the statutory provision limiting review to "final" orders, sought review of the interlocutory order of the Pollution Control Board denying their motions, this case would present a question similar to that involved in *Beckerman*. This, however, they did not do. We note parenthetically that the Court of Appeals for the Fifth Circuit has decided the question contrary to *Beckerman* (see *United States v. Bailey* (1975), 512 F.2d 833; *Gilmore v. United States* (1959), 264 F.2d 44) and that in *People v. Miller*, 35 Ill. 2d 62, it was held "that no appeal lies from an interlocutory order in the absence of a statute or rule specifically authorizing such review" (35 Ill. 2d 62, 67). We note, too, that a panel of the Second Circuit Court of Appeals in *United States v. Alessi* (July 7, 1976), 19 Crim. L. Rptr. 2375, although stating that it would prefer to follow *Gilmore*, considered itself compelled to follow *Beckerman*.

We conclude, for the reason stated, that this record presents no question of the appealability of an interlocutory order and that the complaint failed to state facts which would warrant an exception to the exhaustion doctrine. The judgment of the appellate court is therefore reversed and the judgment of the circuit court of Cook County, dismissing the action, is affirmed.

APPELLATE COURT REVERSED;
CIRCUIT COURT AFFIRMED.

APPENDIX C

In The

SUPREME COURT OF ILLINOIS

[MANDATE]

BE IT REMEMBERED, that, to-wit: on the 20th day of September, A.D. 1976, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of record, to-wit:

No. 47754

BULK TERMINALS COMPANY and GERALD L. SPAETH,

Appellees,

v.

ENVIRONMENTAL PROTECTION AGENCY, RICHARD H. BRICELAND, Director of the Environmental Protection Agency, CITIZENS FOR A BETTER ENVIRONMENT, POLLUTION CONTROL BOARD OF THE STATE OF ILLINOIS, and JACOB D. DUMELLE, RONALD A. HENSS, SIDNEY M. MARDER, RUSSELL T. ODELL and ROGER G. SEAMAN, members of the Pollution Control Board of the State of Illinois,

Appellants.

Appeal from Appellate Court First District
60865—74 L 14413

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings of the Appellate Court, First District, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment of the Appellate Court, First District, there is manifest error.

THEREFORE, it is considered by the Court that for that error and others in the record and proceedings aforesaid, the judgment of the Appellate Court, First District, in this behalf rendered, BE REVERSED, ANNULLED, SET ASIDE AND WHOLLY FOR NOTHING ESTEEMED.

And the Court having diligently examined and inspected as well the record and proceedings of the Circuit Court of Cook County as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment of the Circuit Court of Cook County is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the judgment of the Circuit Court of Cook County, aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

APPENDIX D

In The
SUPREME COURT OF ILLINOIS
[ORDER]

BE IT REMEMBERED, that, to-wit: on the 2nd day of December, A.D. 1976, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Nos. 47746, 47754 Cons.

BULK TERMINALS COMPANY, *et al.*,

Appellees,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al., etc., et al.*,

Appellants.

Appeal from Appellate Court, First District
60865—74 L 14413

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX E

In The
SUPREME COURT OF ILLINOIS

BULK TERMINALS COMPANY, *et al.*,

Plaintiffs-Appellees,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants-Appellants.

ORDER

This cause coming on to be heard on motion of Plaintiffs-Appellees, Bulk Terminals Company and Gerald L. Spaeth, requesting an order staying the issuance of this Court's mandate, due notice having been given and the Court being fully advised in the premises:

IT IS HEREBY ORDERED that the issuance of the mandate in this cause be stayed until the Supreme Court of the United States issues its ruling on Plaintiffs-Appellees' Petition for a Writ of Certiorari.

DATED: December 7, 1976

ENTER:

/s/ Daniel P. Ward

APPENDIX F

IN THE SUPREME COURT OF ILLINOIS

Nos. 47746, 47754, cons.

BULK TERMINALS COMPANY, et al.,

Appellees,

v.

THE ENVIRONMENTAL PROTECTION AGENCY, et al.,

Appellants.

Petition for Rehearing of Bulk Terminals Company and Gerald L. Spaeth
[Excerpts]

* * *

In this landmark decision the Court's opinion fails to disclose it has considered fully the constitutional ramifications of its ruling, which marks a substantial change

in Illinois law and will have a dramatic impact on the constitutional rights of litigants before administrative agencies.

In its opinion in this case this Court has placed procedural form ahead of the Fifth and Fourteenth Amendments to the United States Constitution. At page 2 of its slip opinion, the Appellate Court is quoted as stating ". . . to allow a remedy in a judicial forum *only after the fact of double prosecution* would be improper and could not be mandated by the Administrative Review Act." (Emphasis supplied.) Nevertheless, this Court erroneously has viewed the determinative issue in this case merely as one of exhaustion of administrative remedies. As a consequence of this misconception on the part of the Court, the laws of Illinois no longer provide any meaningful procedural vehicle for persons seeking to invoke the constitutional protection against being placed twice in jeopardy by state prosecutions.

The action brought before Judge Dunne in the special remedies court in the Circuit Court of Cook County was not an interlocutory appeal. It was an action to halt a proceeding that violated plaintiffs' constitutional rights each day it continued. Since the Pollution Control Board actions against the plaintiffs are barred by the prohibition against double jeopardy, the *only* significant order entered by the Board was its order denying plaintiffs' motion to dismiss. Denial of that motion marked the end of administrative remedies available to plaintiffs to protect their right to be free from the burden of defending the actions before the Board. And, under law heretofore well established, even that motion was unnecessary, except as a means of giving notice to the government that plaintiffs' constitutional rights were being infringed.

* * *

Since neither the Environmental Protection Act nor the Administrative Review Act applies in these circumstances, the plaintiffs resorted to fundamental remedies at common law. This Court's decision says that under Illinois law there is no way to raise questions of whether a constitutional right is being infringed by the conduct of an administrative agency until it enters a final order. Thus Illinois law affords no meaningful due process resort for the correction of abuses of individual rights by administrative agencies. The Court does not suggest that the rights plaintiffs have lost here are unimportant, only that there appears to be no judicial machinery available to vindicate them.

* * *

Finally, in its quotation from *Illinois Bell Telephone Co. v. Allphin*, 60 Ill. 2d 350 (1975), the reasons supporting the exhaustion rule were discussed, but the Court in the text of this opinion refuses to recognize that none of these reasons apply in this case. In discussing the traditionally recognized exceptions to that rule, the Court also fails to note that conduct violating an individual's constitutional rights, as in this case, constitutes an irreparable injury *per se*. (See plaintiffs' brief, p. 71.) Therefore, the Court has failed to recognize that the collateral attack of the Board's proceeding made by the plaintiffs through this suit is one that *cannot* be denied a hearing. The courts of Illinois cannot constitutionally refuse to hear this claim because in the final analysis the doctrine of exhaustion of administrative remedies cannot take precedence over the United States Constitution.

This decision should not be allowed to stand for the proposition that plaintiffs can be denied due process of law and violation of their right to be free from double jeopardy under the statutory and common law in Illinois. This opinion does away with a substantial aspect of the plaintiffs' right to be free from double jeopardy and the law of Illinois is stated to be that the double jeopardy safeguards can and have been eroded through statutory construction and a restrictive application of the doctrine of exhaustion of administrative remedies.

For the foregoing reasons the Court should order a rehearing in this case.

* * *